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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Attorneys for Plaintiff,
Phillip Mosier

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN CALIFORNIA

MEJ

PHILLIP MOSIER

Plaintiff,

vs.

CENTRAL INTELLIGENCE AGENCY; and
DOES 1-25,

Defendants.

Case No.:

12

6527

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief, seeking the release of agency records requested by the Plaintiff Phillip Mosier (Hereinafter "Plaintiff" or "Mosier") from the Central Intelligence Agency (hereinafter "CIA," "Agency" or "Defendant").

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552(a)(6)(C)(i).

This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) (2010).

Parties

3. Plaintiff Phillip Mosier is a private individual citizen, residing in Northern California. He is seeking information regarding himself and his record. He is the author of a book and articles regarding the events that are the subject of this litigation.

4. Defendant CIA is a Department of the Executive Branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f)(1) and has, or has had, possession of the documents that plaintiff seeks.

Facts

5. In or about the summer of 1966, Mr. Mossier was interviewed by the CIA and other organizations in Lebanon, Missouri (hereinafter "Interview"). The substance of that interview and its aftermath defined an important part of his identity. It has haunted him for the rest of his life. Mr. Mosier is now an elderly widow. He seeks to resolve this issue before it is too late for him.

6. Mr. Mosier has written books on the subject of the Interview. For years, Mr. Mosier has sought information on the Interview from the CIA. Each attempt has been stalled, blocked and thwarted by the Agency. Despite multiple attempts to obtain information from the Agency, the Agency has failed to provide substantive responses to the requests. In fact, the Agency has failed to admit or deny the existence, current or past, of any documentation on Mr. Mosier or the Agencies' interview of him.

7. By letter dated September 28, 2009, Mr. Mosier requested access to information Defendant has in its possession or available to it regarding Plaintiff. In the summer of 1966, Mr. Mosier was interviewed by the CIA and other organizations in Lebanon, MO. Mr. Mosier seeks information regarding said interview. A copy of this letter is attached as Exhibit 1.

8. By letter dated January 19, 2010, Defendant advised that it was limiting its search. A copy of this letter is attached as Exhibit 2.

1 9. By letter dated February 26, 2010, Plaintiff requested that the search limitations be removed
2 and that the search continue without limitations. A copy of this letter is attached as Exhibit 3.

3
4 10. By letter dated March 29, 2010, plaintiff was denied access to the requested information on
5 the grounds that it was exempt from disclosure under Exemption (b)(1) and (b)(3) and PA
6 exemptions (j)(1) and (k)(1). A copy of this letter is attached as Exhibit 4.

7 11. By letter dated May 7, 2010, plaintiff appealed the denial of this request. A copy of this letter
8 is attached as Exhibit 5.

9
10 12. By letter dated December 23, 2010, plaintiff's appeal was denied. A copy of this letter is
11 attached as Exhibit 6.

12 13. Plaintiff has a right of access to the requested information under 5 U.S.C. 552(a)(3), and
13 there is no legal basis for defendant's denial of such access.
14

15 **Count I**

16 **Violation of the FOIA: Wrongful Withholding of Agency Records**

17 14. Paragraphs 1-13 above are hereby incorporated by reference as if set forth fully herein.

18 15. Defendant has exhausted the applicable administrative remedies with respect to his FOIA
19 Request.

20 16. The CIA has wrongly withheld responsive agency records regarding Defendant.

21 17. Defendant is entitled to injunctive relief compelling the release and disclosure of the
22 requested agency records.
23

24 **Requested Relief**

25 WHEREFORE, Plaintiff prays that this Court:

26 (1) Order defendant to provide access to the requested documents;

27 (2) Expedite this proceeding as provided for in 28 U.S.C. 1657;
28

1 (3) Award plaintiff costs and reasonable attorney's fees in this action, as provided in 5 U.S.C.

2 552(a)(4)(E); and

3
4 (4) Grant such other and further relief as may deem just and proper.

5 DATED: December 24, 2012

6 Respectfully submitted,

7 SOFER LAW

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10 Avner D. Sofer

11 Attorneys for Plaintiff
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Information and Privacy Coordinator
Central Intelligence Agency
1724 F St NW
Washington, D.C. 20505

Re: Phillip Lee Mossier

September 28, 2009

Dear Coordinator:

We represent Phillip Lee Mossier regarding information your organization has in its possession or available to it. In the summer of 1966, Mr. Mossier was interviewed by the CIA and other organizations in Lebanon, MO. Under the Freedom of Information Act, 5 U.S.C. subsection 552, we are requesting all information and records regarding Phillip Lee Mosier, including but not limited to documents, files, photographs, videotapes and pictures.

There should be no fees associated for this request. It is a request for personal information, as well as in the public interest. If there are any fees for searching for, reviewing, or copying the records, please advise us before you task our request.

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

If you have any questions about handling this request, you may contact us at the information hereinabove provided.

Very truly yours,



Avner D. Sofer, Esq

Central Intelligence Agency



Washington, D.C. 20505

January 19, 2010

Avner D. Sofer, Esq.
4040 Civic Center Dr., Suite 200
San Rafael, CA 94903

Reference: P-2010-00009

Dear Mr. Sofer:

On 13 January 2010 we received your 12 January 2010 facsimile providing the correct spelling of your client's name Mr. Philip Lee Mosier in reference to your Privacy Act request referenced above.

Now that we have the correct spelling of your client's name, we have discovered in our records that we previously conducted a search for records pertaining to Mr. Mosier, (P-2006-00097.)

In light of this new information, we only will be performing an updated search on Mr. Mosier. It will be processed in accordance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, and the Privacy Act of 1974, 5 U.S.C. § 552a. Our updated search will be for CIA-originated documents existing from 14 December 2005, the date of our previous acceptance letter, through the date of this acceptance letter. No fees will be charged.

The large number of FOIA requests CIA receives has created unavoidable processing delays making it unlikely that we can respond within the 20 working days the FOIA requires. You have the right to consider our honest appraisal as a denial of your request and you may appeal to the Agency Release Panel. A more practical approach would permit us to continue processing your request and respond to you as soon as we can. You will retain your appeal rights and, once you receive the results of our search, can appeal at that time if you wish. We will proceed on that basis unless you tell us otherwise.

Sincerely,

A handwritten signature in cursive script that reads "Delores M. Nelson".

Delores M. Nelson
Information and Privacy Coordinator

EXHIBIT 2

SOFER LAW

4040 Civic Center Drive
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Delores M. Nelson
Central Intelligence Agency
Information and Privacy Coordinator
1724 F St NW
Washington, D.C. 20505

Re: Philip Lee Mosier
Ref # P-2010-00009

February 26, 2010

Dear Ms. Nelson:

We are in receipt of your letter dated January 19, 2010. Your letter advises that you are planning to limit your search to the time period from 2006 to the present. This is unacceptable.

The previous search conducted in 2006 was deficient. The CIA conducted an interview of Mr. Mosier in the summer of 1966. Yet the previous search result made no mention of this. The current search request expanded the parameters of the initial request. This was done in order to provide the CIA with an opportunity to conduct a more comprehensive search and locate information on the interview. Thus, the current search should be expanded and delve into the period going back to prior to the summer of 1966.

Please conduct a search for all documents in the possession of the CIA (not just CIA-originated documents as described in your letter) from 1964 to the present regarding our client.

Thank you for your cooperation. If you have any questions please contact me.

Very truly yours,

Avner D. Sofer, Esq

EXHIBIT 3

Central Intelligence Agency



Washington, D.C. 20505

March 29, 2010

Avner D. Sofer, Esq.
4040 Civic Center Dr., Suite 200
San Rafael, CA 94903

Reference: P-2010-00009

Dear Mr. Sofer:

We received your letter dated 26 February 2010 objecting to an updated search for CIA-originated documents on your client Mr. Philip Lee Mosier. As such we conducted a search with no date restrictions through 9 March 2010, (the date we received your letter), for all documents in CIA's possession. This is a final response to that request. We processed your request under the Freedom of Information Act and the Privacy Act.

We searched for responsive records that might reflect an open or otherwise acknowledged Agency affiliation. We were unable to locate any such information or records.

Some of the records you requested were from files that are retained only for a short period of time in accordance with the approved schedules of the National Archives and Records Administration. These files have been destroyed.

With respect to responsive records that would reveal a classified connection to the CIA, in accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and relates to CIA intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended. Therefore, you may consider this portion of the response a denial of your request pursuant to FOIA exemptions (b)(1) and (b)(3), and PA exemptions (j)(1) and (k)(1). I have enclosed an explanation of these exemptions for your reference and retention.

You have the right to appeal this response within 45 days of the date of this letter. You may address your appeal to the Agency Release Panel, in my care. Please explain the basis of your appeal.

We appreciate your patience while we were processing this request.

Sincerely,

A handwritten signature in cursive script that reads "Delores M. Nelson".

Delores M. Nelson
Information and Privacy Coordinator

Enclosure

EXHIBIT 4

SOFER LAW

4040 Civic Center Drive
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Fax (415) 785-3601

Agency Release Panel

May 7, 2010

C/O Delores M. Nelson
Information and Privacy Coordinator
Central Intelligence Agency
1724 F St NW
Washington, D.C. 20505

Re: Philip Lee Mosier,
Reference # P-2010-00009

FREEDOM OF INFORMATION ACT APPEAL

Dear FOIA Appeals Officer:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 USC § 552, and is submitted to the Central Intelligence Agency ("CIA" or "Agency") by Sofer Law on behalf of Philip Lee Mosier ("Mosier"). Mr. Philip Mosier is a private citizen of the United States of America. He is not affiliated with any national or international governmental agency. He is simply seeking information that the CIA possesses about him personally. In spite of numerous requests, the CIA had refused to release any information about Mr. Mosier.

On September 28, 2009, Mr. Mosier requested agency records regarding an incident that involved him and the CIA in 1966. (Exhibit A) In the summer of 1966, Mr. Mossier was interviewed by the CIA and other organizations in Lebanon, MO.

Specifically, Mr. Mosier requested the following:

All information and records regarding Phillip Lee Mosier, including but not limited to documents, files, photographs, videotapes and pictures. ("FOIA Request") (Exhibit A).

I. Factual background

In the Summer of 1966, Mr. Mosier was interviewed by the CIA and other governmental agencies. The interview took place in a jail cell in Lebanon, Missouri. The interview involved certain communications Mr. Mosier was alleged to have made.

Numerous requests have been made on the CIA. Thus, far the CIA has refused to disclose any information it has regarding Mr. Mosier.

II. Discussion

Mr. Mosier hereby appeals the CIA's failure to disclose records in response to the FOIA request.

To qualify for exemption 3 under the "deliberative process" privilege, a document must be both (1) "predecisional" or "antecedent to the adoption of agency policy," and (2) "deliberative," meaning "it must actually be related to the process by which agency policies are formulated." Jordan v. United States Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978).

It is the requester's belief that the vast majority, if not all, of the materials in question, are subject to FOIA's mandatory release provisions. The documents are primarily historical in nature. The events in question occurred 45 years ago.

Exemption 3 did not envision the withholding of any governmental document which aids decision-makers, only those which legitimately reflected the deliberations of those making decisions. To construe exemption 5 as proposed in the Agency's denial letter would create an exception which would swallow the general rule of mandatory disclosure. The underlying goal of FOIA remains "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . . ." S. Rep. No 813, 89th Cong., 1st Sess. p.3, n. 6, (1965). The fact that the requested material may contain some incidentals that fall within an exemption cannot act to exempt the entire document from disclosure.

To imply that the FOIA allows the withholding of entire documents merely because a portion may be exempt from disclosure, overlooks entirely the "segregable portions" clause of the Act. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b).

The applicable section of the Code of Federal Regulations also includes the directive that:

"In the event the records requested contain some portions which are exempt from mandatory disclosure and others which are not, the official responding to the request shall insure that all nonexempt portions are disclosed, and that all exempt portions are identified according to the specific exemption or exemptions which are applicable." 7 C.F.R. § 1.8(b), emphasis added.

It is by now well-established law, that a plaintiff in a FOIA case is entitled to an index of the documents and/or portions of documents that have been withheld by the defendant agency. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Moreover, the description of the withheld material must be "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979). Of course we are not in the litigation context yet, but to help avoid such an eventuality, it would certainly be helpful if the Agency were to provide such an index if it were to decide to continue withholding of any portions of the requested records.

Finally, because disclosure would be in the public interest, the CIA should release any materials which happen to be covered by an exemption by utilizing its discretionary release powers. 7 C.F.R. § 1.17(b). Release of material is to be "considered in the public interest if the benefit to the public in releasing the document outweighs any harm likely to result from disclosure." Id.

a. The search was too limited in scope

The Request Denial Letter dated March 29, 2010 ("Denial Letter") (Exhibit B) states, "We searched for responsive records that might reflect an open or otherwise acknowledged Agency affiliation. We were unable to locate any such information." (Par 2, Exhibit B). The FOIA Request did not request that the search be limited to "acknowledged Agency Affiliations." This acknowledgement leaves vague whether the search

was limited to only records regarding such an Agency Affiliation. If it was limited to such records, the search was much more limited than requested in the FOIA Request. If so, the search was improperly limited in scope and must be conducted again more thoroughly.

b. The Denial Letter fails to disclose which records were destroyed

The Denial Letter states that "some of the records requested were from files that are retained only a short time... These files have been destroyed." (Exhibit B, par 3) If files containing information responsive to the Request have been destroyed, Mr. Mosier is entitled to a list of the files, a description of the files, dates the files were created and destroyed, who created the files, who destroyed the files, and what was the purpose of their destruction. The Denial Letter improperly fails to disclose this information. Vaughn v. Rosen, id.

c. The required thorough search was not conducted.

Mr. Mosier hereby appeals the CIA's failure to disclose any records responsive to his FOIA request. The Denial Letter states only that no responsive records were located, in spite of a "thorough search." Agencies must conduct a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); see also *McGehee*, 697 F.2d at 1100 (D.C. Cir. 1983). "If challenged, [the agency] must demonstrate beyond material doubt that the search was reasonable." *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (quoting *Truitt v. Department of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.C. Cir. 1990)). "The adequacy of the [agency's] search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case." *Natural Res. Def. Council v. Dep't of Def.*, 388 F. Supp. 2d 1086, 1095 (C.D. Cal. 2005) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). When an agency is unable to locate responsive documents, it bears the burden proving that its less than comprehensive search is reasonable under the circumstances. *McGehee*, 697 F.2d at 1101.

Given that the existence of the interview has been well-documented (See Exhibit C), it is very unlikely that a truly "thorough search" by the CIA would fail to turn up a single record satisfying The Request.

d. The Denial Letter fails to address all outstanding records.

The Denial Letter lists 3 categories of records denied: 1) Records that might reflect an Agency Affiliation; 2) Records that were in files that were destroyed; and 3) Responsive records that would reveal a classified connection to the CIA. However, the Denial Letter fails to address records that do not fall within these three categories. Mr. Mosier is entitled to all records that are not included in these categories.

e. The CIA is hiding behind blanket exemptions, while failing to provide any substantiation.

Mr. Mosier hereby appeals the CIA's failure to disclose records based on its stated exemptions. The CIA alleges that responsive documents are exempt in full pursuant to FOIA Exemptions b(1), b(3) and PA exemption (j)(1) and (k)(1). The CIA's full withholding under FOIA Exemption b(1) and (b)(3) was improper. Those exemption permit an agency to withhold records that constitute "information currently and properly classified." (b)(3) allows an exemption that another Federal Statute protects. 5 U.S.C. § 522(b)(3). The Denial Letter fails to state what statutes it is relying on. The phrasing in the Denial Letter suggests that the records qualify for the deliberative process privilege as recognized by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975). Yet records responsive to The Request would not be properly withheld under this privilege. When describing this privilege, the Supreme Court specifically differentiated between predecisional documents and post-decisional documents, only finding protection for the former. *Id.* at 151-53. Additionally, the Court has cited the affirmative disclosure requirements of subsection (a)(2) of the FOIA—including "statements of policy and interpretations which have been adopted by the agency"—as evidence of "a strong congressional aversion to secret agency law." *Id.* at 153 (internal citation omitted). The request was regarding records personal to Mr. Mosier. Mr. Mosier did not request

draft version of privacy policies, which might qualify as "predecisional." Rather, Request specifies records personal to Mr. Mosier. As such, the CIA's assertion of Exemption b(1) and b(3) to withhold these documents is improper.

The Denial Letter described some of the records as "currently and properly classified pursuant to an Executive Order," and therefore exempt from disclosure under 5 U.S.C. § 522(b)(1). Additionally, CIA asserts Exemption b(3), (j)(1) and (k)(1) as to some records, and alleges that the information is exempt pursuant to various statutes. The Agency has not established any factual basis for these withholdings. Because the documents were withheld in full pursuant to Exemption b(1), (3), (j)(1) and (k)(1) it is impossible for Mr. Mosier to determine whether these asserted exemptions are proper without additional information concerning the records.

f. Any claim that the records are classified is defeated by length of time and publication of facts.

The Denial Letter claims that the records are classified. However, the records requested reflect events that transpired 45 years ago to one individual. It is specious to claim that the events from so long ago, in such a finite and narrow scope would have any classified relevance today. Additionally, the matter has been published and widely disseminated (Exhibit 3). Thus, the claim that the records are somehow still classified is illogical and unfair and must be stricken.

Finally, Mr. Mosier Appeals based on the tardiness of the CIA's response to the Request. An administrative appeal may be undertaken upon either, the denial of an initial FOIA request, or an agency's failure to issue a determination within the statutory 20-day time deadline. 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(C).

III. Conclusion

The CIA failed to comply with The FOIA Request by performing an inadequate search for responsive documents and by asserting inapplicable exemptions in order to improperly withhold records. The CIA's improper withholding of these records also flatly contravenes a recent memorandum on the Freedom of Information Act issued by the President of the United States and explicit FOIA guidance promulgated by the Attorney General. On January 21, 2009, President Obama stated that "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. . . . The presumption of disclosure should be applied to all decisions involving FOIA."¹ On March 19, 2009, Attorney General Eric Holder promulgated new FOIA guidelines for heads of all Executive Departments and Agencies to ensure that the "nation's fundamental commitment to open government . . . is realized in practice."² Mr. Mosier appeals the CIA's failure to disclose responsive documents and its failure to perform an adequate, reasonable search for the agency records described in Mr. Mosier's FOIA request.

Very truly yours,


Avner D. Sofer, Esq.

¹ President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act," January 21, 2009, available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>

² Available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>

Central Intelligence Agency



Washington, D.C. 20505

DEC 23 2010

Avner D. Sofer, Esq.
4040 Civic Center Dr., Suite 200
San Rafael, CA 94903

Reference: P-2010-00009

Dear Mr. Sofer:

This responds to your 7 May 2010 letter appealing our 29 March 2010 final response to your Freedom of Information Act (FOIA) and Privacy Act (PA) request for information on your client Mr. Philip Lee Mosier. Specifically, you appealed our final determination that we have been unable to locate records responsive to your client's request, to the extent it seeks records of an open or acknowledged CIA association, and that we can neither confirm nor deny the existence or nonexistence of records revealing a classified association between the CIA and your client under either the FOIA or the PA, which you may consider a denial based on FOIA exemptions (b)(1) and (b)(3) and PA exemptions (j)(1) and (k)(1).

The Agency Release Panel (ARP) considered your appeal and determined that we made a reasonable effort to search appropriate record systems under the FOIA and the PA but were unable to locate any records responsive to that part of your request concerning an overt or otherwise acknowledged association between your client and the CIA existing prior to 09 March 2010 (the date your request was received). With respect to records that would reveal a classified connection to the CIA, the ARP determined that the CIA can neither confirm nor deny the fact of the existence or nonexistence of records responsive to this part of your request. The "fact of" the existence or nonexistence of such records is currently and properly classified and relates to CIA intelligence sources and methods information that is protected from disclosure pursuant to section 6 of the CIA Act of 1949 and section 103(c)(5) of the National Security Act of 1947, as amended. You may consider this portion of the response a denial of your request pursuant to FOIA exemptions (b)(1) and (b)(3) and PA exemptions (j)(1) and (k)(1). Therefore, in accordance with Agency regulations, the ARP denied your appeal. For your information, Agency regulations are set forth in parts 1900 and 1901 of title 32 of the Code of Federal Regulations. In accordance with the provisions of the FOIA and the PA, you have the right to seek judicial review of this determination in a United States district court.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Koch", with a long horizontal line extending to the right.

Scott Koch
Executive Secretary
Agency Release Panel

EXHIBIT 6